Supreme Court, U.S.
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DOCKET NO.

IN THE SUPREME COURT OF THE UNITED STATES

TERM: October 9, 1995 to October 6, 1996.

ALICIA BARBER,

Plaintiff-Appellant,

vs.

HALLMARK CARDS, INC.,

Defendant-Appellee,

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit.

PETITION FOR WRIT OF CERTIORARI

David O. Alegria
McCULLOUGH, WAREHEIM & LaBUNKER, P.A.
1501 S.W. Topeka Boulevard
Topeka, Kansas 66612

89PP

QUESTIONS PRESENTED FOR REVIEW

1. Whether Kansas courts, in requiring plaintiffs opposing a motion for summary judgment in a retaliatory discharge case to demonstrate the existence of such retaliatory discharge by presenting clear and convincing evidence sufficient to support a jury verdict in plaintiff's favor, usurps the plaintiff's right to trial by jury, nullifies the cause of action and violates plaintiff's 7th amendment right of trial by jury.

2. Whether it is possible for a plaintiff to fully try a retaliatory discharge case thought paperwork in responding to a summary judgment motion

3. Whether in Kansas, plaintiffs opposing a motion for summary judgment have the burden of proving such case by clear and convincing evidence to the court prior to being afforded a right to trial by jury.

LIST OF ALL PARTIES

Plaintiff/Appellant, Alicia Barber. Defendant/Appellee, Hallmark Cards, Inc. There are no parent of subsidiary companies to be listed.

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BASIS FOR JURISDICTION

DATE OF JUDGMENT

January 19, 1996

DATE OF ORDER ON REHEARING

February 21, 1996

STATUTORY PROVISIONS FOR JURISDICTION

28 U.S.C. § 2101(c)

NOTIFICATION

N/A

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

Plaintiff's cause of action is based on common law.

STATEMENT OF THE CASE

This is a retaliatory/constructive discharge case, a tort action. The plaintiff, Alicia Barber, was fired from her employment with defendant, Hallmark Cards, Inc., in retaliation for her pursuit of workers' compensation remedies under the Kansas Workers Compensation Act, and for absences related to

her work-related injury.

In a Memorandum and Order entered on September 14, 1994, District Judge Sam A. Crow struck portions of Plaintiff's affidavit and granted Defendant summary judgment. Judge Crow found that defendant was entitled to summary judgment on the grounds that the plaintiff was fired not in retaliation for filing a workers' compensation claim but, instead, because her permanent medical restrictions made her incapable of performing any of the jobs available at Hallmark for the foreseeable future.

In this appeal, plaintiff submits that this case presents genuine issues of material fact which were ignored by the district court. Specifically, Plaintiff presented evidence to support her position that jobs were available at Hallmark which she was capable of performing at the time that she was fired. Accordingly, this appeal seeks an order vacating the summary

judgment entered in favor of defendant, and thereby reinstate plaintiff's cause of action, so that this case can proceed to trial for decision on the merits.

Most importantly, the issue decided by the court was a controverted issue of material fact, invaded the province of the trier of fact and violated the plaintiff's right to trial by jury.

Jurisdiction of this action was conferred upon the district court on the basis of diversity of citizenship, 28 U.S.C. § 1332. Ms. Barber, the plaintiff, is an individual, resident of the state of Kansas. Defendant is a Missouri corporation with its primary place of business in Missouri.

ARGUMENT

This case illustrates a current trend in Kansas wherein courts have taken over the role of a jury and are requiring plaintiffs in retaliatory discharge cases to prove such cases by a clear and convincing standard of proof to

the court as a condition precedent to being entitled to a trial by jury. Plaintiff contends and thereupon alleges that the right to trial by jury is a constitutionally guaranteed right that is being usurped under the current approach by Kansas courts.

Although, the summary judgment vehicle has been deemed to be constitutional and an expedient way to dispose of disputes, when such procedure is employed by the court to make judgment calls that are within the province of the jury, and the court requires a plaintiff to prove his/her case to the court in order to grant a trial by jury, the procedure becomes unconstitutional.

Under traditional summary judgment standards, a plaintiff was only required to show that a genuine dispute existed and controverted issues of material fact at stake. In analyzing such motion the court was only required to determine whether the possibility existed that

a reasonable jury could find for the non-moving party. Under such traditional standards for summary judgment, the moving party was required to demonstrate the absence of a triable issue in order to be entitled to summary judgment. If the movant was able to make a showing sufficient to make it appear that there was an absence of a triable issue, the non-movant was only required to dispute the alleged lack of controversy and come forth with evidence in the record of controverted issues of material fact.

A successful summary judgment motion was an extremely heavy burden imposed upon the moving party and was a vehicle seldom used. Over time, courts have been increasingly more willing to summarily dispose of cases at summary judgment motion stage. Over time, courts have taken over the role of analyzing evidence, assessing the quality of the evidence, assessing the quantity of the evidence, weighing of the evidence, and making conclusions as to credibility and intent.

Currently, in retaliatory discharge cases, it has become the practice in Kansas that once a defendant moves for summary judgment, the procedure set in motion requires a plaintiff to, through paperwork, present clear and convincing evidence of entitlement to a favorable jury verdict, before being entitled to proceed to trial.

Procedurally, a defendant circumscribes the parameters of its motion and the evidence to be presented to the court.

A causal connection between the firing of an employee and the exercise of statutory rights by such employee more often than not, can only be shown through various pieces of circumstantial evidence that tend to make the existence of a fact, more probably true than not. Most importantly, such causal connection is shown through the perception by the trier of fact of the demeanor of the witnesses and the assessment by the trier of facts of defendant's

intent in firing a plaintiff. Because of the manner in which the causal connection must be presented, most often than not, it is impossible for a plaintiff to persuade a court by clear and convincing evidence of the existence of such causal connection in a motion for summary judgment.

In disposing of plaintiff's case at summary judgment stage in in *Rodriguez v. IBP, inc.*, U.S. District Court Case No. 94-1168-PFK, the court ruled that Kansas courts have uniformly held that:

> a party opposing a motion for summary judgment must demonstrate the existence of the retaliatory discharge by presenting evidence of a clear and convincing nature sufficient to support a jury verdict in his favor. at p. 11.

Such requirement expressly requires a plaintiff to win his case through paperwork prior to being entitled to trial by jury. The requirement

clearly violates a plaintiff's constitutional right to trial by jury.

The defense bar in Kansas have persuaded the judiciary to analyze summary judgment motions employing a clear and convincing standard of proof to weigh the evidence in retaliatory discharge cases and make credibility and motive determinations at such stage

The unique combination of a new a more stringent application of summary judgment standards coupled with a requirement that a plaintiff must present clear and convincing evidence through paper work in essence eliminates a remedy for wrongful discharge in violation of the public policy of the State of Kansas.

The role of courts in ruling on summary judgment motions in Kansas have gone too far and immediate corrective action is needed. This is plaintiff's last chance at justice for herself and for all others whose cases will be disposed

at summary judgment stage unless corrective action is taken by this court.

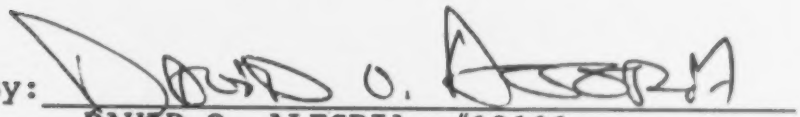
In this case, Ms. Barber was ready willing and able to work at the time she was fired. All she did was complain of physical problems, ask to be allowed to see her doctor and to be excused from work to secure medical treatment. Therefore, she was fired solely and as a direct result of her exercise of statutory rights under the Kansas Workers' Compensation Act. In spite of the fact that Ms Barber was working up to the time she was fired, her case has been summarily disposed merely because defendant argued that it did not have long term jobs that would accommodate Ms. Barber's restrictions. Such belated argument with respect to restrictions under which Ms. Barber had been working make it clear that defendant's articulated motive for firing her was pretextual. In addition, there is substantial evidence that Ms. Barber was harassed, mistreated, disciplined, denied

raises, denied transfers, all because of her work related injuries. Therefore, had it not been for the Court's improper approach to summary judgment standards, Ms. Barber's case should have been tried to a jury.

For the foregoing reasons, plaintiff respectfully prays that her petition for a Writ of Certiorari be granted and that the court restore to Kansas employees fired in violation of public policy, a right to trial by jury.

Respectfully submitted,

McCULLOUGH, WAREHEIM & LaBUNKER, P.A.

By: 

DAVID O. ALEGRIA, #13111
1507 S. W. Topeka Boulevard
P. O. Box 1453
Topeka, Kansas 66601-1453
(913) 233-2323
ATTORNEYS FOR ALICIA BARBER
PLAINTIFF/APPELLANT

APPENDIX

Order and Judgment, U. S. Court of Appeals, Tenth Circuit, filed January 19, 1996

Memorandum and Order, U.S. District Court for the District of Kansas, filed September 14, 1994

Order, U. S. Court of Appeals, Tenth Circuit, entered February 21, 1996

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ALICIA BARBER,
Plaintiff-Appellant,

v.

No 94-3356
(D.C. No. 93-4087-SAC)
(District of Kansas)

HALLMARK CARDS, INC.
Defendant-Appellee.

ORDER AND JUDGMENT*

Before BRISCOE and MURPHY, Circuit Judges and JENKINS,** Senior District Judge

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Plaintiff brought this action for retaliatory discharge and intentional

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of order and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3

**Honorable Bruce S. Jenkins, Senior United States District Judge for the District of Utah, sitting by designation.

infliction of emotional distress, alleging that she was terminated by defendant for seeking workers' compensation benefits. The district court granted defendant's motion for summary judgment on the grounds that plaintiff was discharged not for filing a workers' compensation claim, but because her permanent medical restrictions prevented her from performing any available job for the defendant. This court agrees.

Plaintiff Alicia Barber began production work for defendant Hallmark Cards on January 22, 1990. That spring, when the department in which she had been working was phased out. Barber applied for and was placed in the position of card scrap operator. This position involved separating greeting cards from perforated sheets with a rubber mallet. Shortly thereafter, Barber reported to the company nurse complaining of soreness in her

wrists. In response, Barber was placed on "light duty." Light duty consisted of temporary assignments which did not require as much repetitive motion of the hands and wrists. In September 1990, Barber was offered a transfer to a position as a card packager, which Hallmark believed would be less stressful to her injuries.

When her symptoms did not improve and the company nurse denied her request to be referred to a physician, Barber consulted an attorney. Thereafter, her attorney initiated a workers' compensation proceeding on her behalf. In response to the orders of the physician, Dr. Hoffman, Hallmark placed Barber on restricted light duty work from November 20, 1990 through January 9, 1991. This work consisted of temporary responsibilities, performed a total of one hour per day, such as sweeping, assembling scheduling

information, counting cards, opening packages, and checking the quality of cards. During this period, Barber was paid full-time wages.

Her condition improved and Dr. Hoffman released her for regular duty on January 10, 1991. Barber's symptoms recurred and, based on new orders from Dr. Hoffman, Barber was again placed on light duty, this time answering the phone for one-half hour a day. Barber improved and Dr. Hoffman released her to return to four-hour days of regular duty. Her symptoms again returned and, on April 5, 1991, Dr. Hoffman issued permanent restrictions against Barber's repetitive use of her hands, wrists, and elbows, and specifically against"keyboard activity." Barber returned to work the following week.

Between April 8, 1991, when she returned to work full-time, and April 15,

1991, her last day of work at Hallmark, Barber worked only three and on-half days. She took vacation and voluntary leave the rest of the time. For two days Barber was assigned light duty placing names on a magnetic board and affixing stickers. She spent the third day making box labels and coaching another employee through keyboard procedures. On her last half-day of work at Hallmark, Barber swept the floor, dusted equipment, and laid tape. On April 17, 1991, in response to Barber's objections to these light duty tasks, Bud Anderson, Hallmark's Human Resources Director, offered Barber the choice of tendering her resignation or being terminated. Anderson subsequently told Barber that her Termination would be recorded as "released."

Plaintiff's diversity claims sought recovery for retaliatory discharge and intentional infliction of emotional

distress. Following discover, both parties filed summary judgment motions and supporting memoranda. In paragraph ten of an affidavit attached to her reply brief, Barber for the first time testified that on the day of her termination Anderson told her Hallmark had many jobs available which she could perform. This statement directly contradicted her earlier deposition testimony in which she testified that Anderson told her there were no jobs available within her restrictions.

The district court granted defendant's motion for summary judgment, holding that portions of Barber's affidavit, including paragraph ten, represented an attempt to create a "sham fact issue" and therefore did not create a genuine issue of material fact. Plaintiff appeals the district court order striking portions of her affidavit and granting

summary judgment to defendant on her retaliatory discharge claim.

Barber first argues that the district court erred by granting Hallmark's motion to strike pertinent parts of her affidavit. In her opening and reply briefs on appeal, Barber only refers to paragraph ten of her affidavit. Consequently, this court's review is limited to the issue of whether the district court erred by striking paragraph ten of her affidavit.

The admissibility of an affidavit submitted on summary judgment is an evidentiary question. Lujan v. National Wildlife Fed'n, 497 U.S.871, 894-95 (1990). Such evidentiary rulings are reviewed under an abuse of discretion standard. Boughton v. Cotter Corp., 65 F.3d 823, 832 (10th Cir. 1995). Accordingly, the district court's decision to strike portions of Barber's affidavit

will not be disturbed unless this court is left with "*a definite and firm* conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." United States v. Ortiz, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986_.

In considering a motion for summary judgment, the district court may disregard an affidavit that conflicts with the affiant's prior deposition testimony if the conflicting affidavit represents "an attempt to create a sham fact issue." Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986). The factors relevant to the existence of a sham fact issue include: whether the affiant was cross-examined or subject to cross-examination during her earlier testimony or whether the affidavit was based on newly-discovered evidence; and whether the earlier testimony reflects confusion which the affidavit attempts to

explain. Rios v. Bigler, 67 F.3d 1543, 1551-52 (10th Cir. 1995); Franks, 796 F.2d at 1237.

Barber urges that she was not cross-examined at her deposition. Her attorney, however, was present and had the opportunity to cross-examine her, although he chose not to. The opportunity for cross-examination, even if not exercised, is a factor weighing in favor of the district court's order striking portions of plaintiff's affidavit. Barber further argues that her affidavit was intended to reference availability of shout-term jobs while her deposition testimony was intended to reference availability of long-term jobs. Neither her deposition testimony nor her affidavit, however, specify short-term or long-term positions. Each is unequivocal, the former indicating Hallmark's Anderson did not state there were jobs available and the latter

indicating the opposite. During the deposition, she testified on three occasions that Anderson told her there were no jobs available within her restrictions. Under these circumstances, it cannot be said that Barber's deposition reflects confusion which her later affidavit attempts to explain. Consequently, the district court did not abuse its discretion when it struck portions of Barber's affidavit as an attempt to create a sham fact issue.

Barber next argues that the district court improperly granted summary judgment to defendant on her retaliatory discharge claim. This court reviews the district court's entry of summary judgment de novo, applying the same legal standard used by the district court. Schusterman v. United States, 63 F.3d 986, 989 (10th Cir. 19915). Summary judgment is appropriate if there is no genuine issue of material

fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Under Kansas law, an employee may bring an action for retaliatory discharge if the employer discharges the employee in retaliation for filing a workers' compensation claim or for absences due to a work-related injury. Coleman v. Safeway Stores, Inc., 752 P.2d 645, 652 (Kan. 1988); Murphy v. City of Topeka, 630 p.2d 186, 193 (Kan. Ct. App. 1981). Kansas law, however, does not require an employer to retain an employee who, as a result of a work-related injury, is physically unable to perform any available job of the employer. *Rowland v. Val-Agri, Inc.*, 766 P.2d 819, 820 Syl. ¶4 (Kan. Ct. App. 1988). The Kansas Court of Appeals in Rowland held:

> When a discharge employee is not capable of performing the duties of his or her job because of a

> work-related injury and the termination of that employee's workers' compensation claim is not a condition of his or her reemployment, but another position cannot be found which the employee can fill, the employee does not have a tort action for retaliatory discharge against his or her former employer.

Id. The availability of jobs for which the employee is qualified is therefore essential to the employee's retaliatory discharge claim.

Barber contends that there were jobs available at Hallmark for which she was qualified. She argues that certain deposition testimony of her supervisor, William Thornton, and Hallmark's Human Resources Director, Bud Anderson, creates a genuine issue of material fact precluding summary judgment. Upon careful review of the record, the court is satisfied that the statements upon which Barber relies are taken out of context and

do not raise a genuine issue of material fact.

We AFFIRM the district court order striking the paragraph ten of plaintiff's affidavit and granting summary judgment to the defendant.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ALICIA BARBER,

Plaintiff,

v. No. 93-4087-SAC

HALLMARK CARDS, INC.,

Defendant.

MEMORANDUM AND ORDER

The case comes before the court on cross-motions for summary judgment (Dk. 62 and 64) and on the defendant's motion to strike the plaintiff's affidavit (Dk. 77). This is an employment termination case in which the plaintiff claims that Hallmark Cards, Inc. ("Hallmark") fired her in retaliation for pursuing her Worker's compensation remedies and for absences caused by her work-related injury. The plaintiff also claims that Hallmark committee the tort of intentional infliction of emotional distress. For the

reasons stated below, the court finds that the defendant is entitled to summary judgment on both claims. The uncontroverted facts establish that the plaintiff was terminated, not in retaliation for her Workers' Compensation claim, but because her qualifications and permanent medical restrictions prevented her from physically performing the full-time jobs available at Hallmark. In addition, there is no evidence that the defendant engaged in extreme and outrageous conduct or that the plaintiff suffered severe or extreme emotional distress as a result of the defendant's actions.

SUMMARY JUDGMENT STANDARDS

A court grants a motion for summary judgment if a genuine issue of material fact does not exist and if the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 250 (1986). The substantive law governing the suit dictates which facts are material or not. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will . . . preclude summary judgment." *Id.* There are not genuine issues for trial if the record taken as a whole would not persuade a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "[T]here are cases where the evidence is so weak that the case does not raise a genuine issue of fact." *Burnette v. Dow Chemical Co.*, 849 F.2d 1269, 1273 (10th Cir. 1988). The court reviews the evidence under the burden of standard and applicable to the particular claim. *Anderson*, 477 U.S. at 255.

The movant's burden under Rule 56 of the Federal Rules of Civil Procedure is

to lay out the basis of its motion and to "point to those portions of the record that demonstrate an absences of a genuine issue of material fact given to relevant substantive law." *Thomas v. Wichita Coca-Cola Bottling, Co.*, 968 F.2d 1022, 1024 (10th Cir.), *cert. denied*, 113 S. Ct. 635 (1992). "A movant is not required to provide evidence negating an opponent's claim." *Committed for First Amendment v. Campbell*, 962 F.2d 1517, 1521 (20th Cir. 1992) (citation omitted).

If the moving party meets its burden, then it becomes the nonmoving party's burden to show the existence of a genuine issue of material fact. *Bacchus Industries, Inc. v. Arvin Industries, Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). When the nonmoving party will have the burden of proof at trial, "'Rule 56(e) . . . [then] requires the nonmoving party to go beyond the pleadings and by her own

affidavits or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). "Unsubstantiated allegations carry no probative weight in summary judgment proceedings." *Phillips v. Calhoun*, 956 F.2d 949, 951 (10th Cir. 1992) (citations omitted). The court views the evidence of record and draws inferences from it in the light most favorable to the nonmoving party. *Burnette v. Dow Chemical Co.*, 849 F.2d at 1273.

More than a "disfavored procedural shortcut," summary judgment is an important procedure "designed 'to secure the just, speedy and inexpensive determination of every action.' Fed R.

Civ. P. 1." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). At the same time, a summary judgment motion is not the chance for a court to act as the jury and determine witness credibility, weigh the evidence, or decide upon competing inferences. *Windom Third Oil and Gas v. Federal Deposit Ins.* 805 F.2d 342, 346 (10th Cir. 1986), *cert. denied*, 480 U.S. 947 (1987).

STATEMENT OF UNCONTROVERTED FACTS

For purposes of the pending motions, the court accepts the following facts as uncontroverted:

1. The plaintiff, Alicia Barber, began worked for Hallmark on January 22, 1990, as a handwork assembler in the Party Department. Two months later, she transferred to the Large Die Cut Department where she worked as a card scrap operator. She did not start working in this department until mid-April of

1990. Her new job consisted of separating cards from perforated sheets with a rubber mallet.

2. Approximately a week after starting as a card scrap operator, she went to the company nurse complaining of soreness in both wrists. On a somewhat regular basis from April through September of 1990, the plaintiff visited the company nurse with complaints of pain in wrists and hands. In response, the nurse often provided the plaintiff with wrist supports and Advil. The plaintiff also participated in a light duty program which entailed her temporary rotation into other jobs that did not require the same repetitive demands on the wrist and hands.

3. Because of her wrist and hand problems, the plaintiff was offered packaging work that was available in three different departments. The defendant believed this work would be less stressful

on the plaintiff's hands and wrists. The plaintiff chose a packaging position with the Film Packaging or Counter Packaging Department. She started on September 4, 1990, as a card packer. Her job consisted of picking cards off a conveyor belt, putting them in a carton, and placing the cartons into a box while standing at a waist-high table. She was given a trial period of two days to determine if she could do the work. The plaintiff told her supervisor after the trial period that she was not having problems with this new work.

4. The plaintiff's complaints of wrist and hand pain, however, did not end with this new job. Approximately a week after the trial period, the plaintiff again complained to the company nurse to refer her to a physician, but the company nurse declined the request in favor of more conservative treatment.

5. During this period, the plaintiff consulted an attorney. In a letter dated September 21, 1990, her attorney demanded Workers' Compensation benefits.

6. The company nurse referred the plaintiff in late September to Dr. Sergio Delgado for a medical evaluation. Dr. Delgado diagnosed tendinitis, prescribed an anti-inflammatory medication, and recommended light-duty work and physical therapy. Also in September, the plaintiff was seen by Dr. Mary Hoffman in Lawrence on her attorney's referral. Dr. Hoffman did not place any limitations on the plaintiff's work because she was not the authorized treating physician at that time.

7. After September 20, 1990, the plaintiff was given very restricted light-duty work. This was irregular, temporary responsibilities such as office work,

sweeping, assembling scheduling information, counting cards, opening packages, checking the quality of cards, and placing names on a magnetic board. Despite this light-duty work, the plaintiff continued to have problems with her hands and wrists.

8. During this period of physical therapy, the plaintiff missed some sessions because of car problems. The physical therapist also reported to the company nurse that the plaintiff was not putting forth much effort, arrived late, missed sessions, and left early. Hallmark officials, including the company nurse and the assistant human resources director, spoke with plaintiff about the importance of physical therapy. They also warned her that the failure to cooperate with medical treatment could lead to termination.

9. On September 27, 1990, the plaintiff was counseled by her supervisor

for six frequencies of absences during her first eight months of employment. The sixth absence was due to the plaintiff's work-related injury. The plaintiff was due a merit raise on October 25, 1990. Because of the first five frequencies of absences, none of which were related to the plaintiff's injury, Hallmark delayed the plaintiff's raise. On December 25, 1990, the plaintiff received the raise despite missing many hours after October 25, 1990, and working as little as one hour a day after November 20, 1990, as a result of her work-related injury.

10. On October 18, 1990, the plaintiff filed an application in the workers' compensation proceeding for a change in the treating physician to Dr. Hoffman. Her request was granted on November 18, 1990, and she visited Dr. Hoffman that same day. Dr. Hoffman diagnosed tendinitis in both hands and

elbows, took the plaintiff off work, and began physical therapy. At that time, Dr. Hoffman did not know that Hallmark had a program allowing an injured employee to work as little as one hour a day doing tests within the physician's restrictions.

11. Mr. Anderson, the Human Resources Director at Hallmark, called Dr. Hoffman on November 20, 1990, and informed her of Hallmark's light-duty program.[1] Upon learning about that alternative, Dr. Hoffman changed the plaintiff's work restriction to one hour of light-duty work each day. On December 10, 1990, Dr. Hoffman saw improvement in the plaintiff's condition and kept the plaintiff on the light-duty work restriction. All of the time that the plaintiff was on light duty, she was paid wages for a full eight-hour

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[1]There is no evidence to suggest that Anderson offered Dr. Hoffman an economic incentive to change the plaintiff's work restriction.

day even though she may have worked actually less than one hour.

12. Dr. Hoffman released the plaintiff for full-time regular work on January 10, 1991. The plaintiff returned to her job in the counter packaging department on January 11, 1991. She was placed in a work-hardening program where she worked two hours as a packer and then two hours doing a less repetitive assignment. Her new manager, Mark Leggio, was asked by the Human Resources Director to monitor how the plaintiff was progressing and to prepare a log of her complaints, performances, and absences. After her first two complete eight-hour shifts of card packaging, the plaintiff told Leggio that she was doing okay and had no complaints of pain or swelling.

13. On January 28, 1991, after working six hours, the plaintiff complained of swelling wrists. She was

given wrist supports and was moved to less stressful work. The plaintiff missed her scheduled physical therapy sessions during the period from January 3, 1991, through February 10, 1991.

14. On February 6, 1991, the plaintiff saw Dr. Hoffman complaining of the recurrence of all problems. Dr. Hoffman ordered physical therapy every other day and issued a written work restriction that the plaintiff was to be taken "off all work that requires repetitive flexion wrist & fingers." In compliance with that restriction, Hallmark had the plaintiff report for light-duty work for one-half hour each day.

15. On February 22, 1991, the plaintiff saw Dr. Hoffman. There was some improvement in the plaintiff's condition. There was some improvement in the plaintiff's condition. The plaintiff asked to return to regular duty for four

hours a day so that her symptoms would worsen and her therapist could observe the plaintiff's problems. Dr. Hoffman released the plaintiff for regular duty for only four hours a day. Hallmark complied with this work restriction.

16. On March 8, 1991, Dr. Hoffman continued the same four-hour restriction and physical therapy. Hallmark also followed this work restriction.

17. On April 5, 1991, the plaintiff told Mr. Hoffman that the pain and swelling continued as long as she worked four hours a day. After conducting an examination, Dr. Hoffman concluded that further physical therapy would not help and that the plaintiff should not return to any work requiring repetitive use of the hands and wrists. Dr. Hoffman advised the plaintiff to leave her job and recommended vocational rehabilitation in training and assisting the plaintiff for

another type of employment. Dr. Hoffman then released the plaintiff work with permanent restrictions against "repetitive use of hands, wrists and elbows" and "keyboard activity." The plaintiff gave this written restrictions to the defendant's company nurse, who, in turn, notified management.

18. The plaintiff returned to full-time work in the same packaging department on April 8, 1991. Her manager attempted to assign her duties that did not require repetitive use of her hands and wrists. She placed magnets or yellow dots on a scheduling board and prepared outside box labels. The plaintiff believes that these duties were in violation of her doctor's restrictions. From April 8, 1991, through April 15, 1991, the plaintiff worked only three and one-half days and took two vacation days. On April 15th, she worked until meal break throwing away boxes,

sweeping the floor, dusting equipment with a blower, and putting tape on the floor. At meal break, the plaintiff went home and called her supervisor from home saying she would not be back that night because her hands were hurting.

19. On April 16, 1991, the plaintiff called Hallmark saying her hands still hurt and she was trying to get an appointment with Dr. Hoffman.

20. On April 17, 1991, Bud Anderson, the Human Resources Director, called the plaintiff. During that conversation, Anderson explained that Hallmark did not have a regular, long-term job for her considering her permanent medical restrictions and her qualifications. Anderson noted that the plaintiff was having difficulty even doing the temporary light duty work. Anderson suggested that the solution for her and Hallmark was to "part company." At that point, Anderson

offered the plaintiff a choice to resign or to be released.[2]

21. After this initial conversation, the plaintiff called her attorney and then called Anderson. The plaintiff said she did not want to resign and asked what job were available. Anderson responded that there were no long-term regular jobs that she could do within her restrictions and qualifications. Anderson then told the plaintiff that her termination would be recorded as released.

22. There is no credible evidence that the plaintiff was physically capable of doing any of the available regular full-time production jobs for which she was qualified.

MOTION TO STRIKE

The plaintiff filed a reply brief in

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[2]It is controverted whether the plaintiff agreed to resign in the initial conversation.

support of her motion for summary judgment. The plaintiff attached to that brief her affidavit which the defendant now seeks to strike as contradicting her earlier deposition testimony. The court agrees with the defendant and strikes certain averments, paragraphs ten through fourteen, of the plaintiff's affidavit.

A court may sanction a party who presents an affidavit in bad faith in a summary judgment proceeding. Fed. R. Civ. P. 56(g). It follows that a court has the discretion to strike sham affidavits submitted pursuant to Rule 56. *Cook v. Babbit*, 819 F. Supp. 1, 21 (D.D.C. 1993). "Generally, a witness' affidavit may not be disregarded simply because it conflicts with a prior deposition."" *Independent Drug Wholesalers Group, Inc. v. Denton*, 833 F. Supp. 1507, 1520 (D. Kan. 1993) (citation omitted); *See Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986).

Conflicting affidavits can be disregarded if they are "an attempt to create a sham fact issue." *Franks*, 796 F.2d at 1237. Factors relevant in this determination include: "whether the affiant was cross-examined during his earlier testimony, whether the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain." *Id.* The court assumes the standard and factors for disregarding a sham affidavit are the same for striking a sham affidavit.

The plaintiff avers at paragraph ten that Bud Anderson told her on April 17, 1991, "that Hallmark had available many jobs that I could perform and which were within my restrictions." In her deposition, the plaintiff said that

Anderson told her on April 17, 1991, that he could not promote the plaintiff within her restrictions and that "the only solution he would see was to part company." (pp. 229, 234). She also testified that during their conversations that day:

> A. I asked him if there was anything that he could find for me to do within my restrictions.
> Q. You asked him that?
> A. Yes.
> Q. And what did he say?
> A. He said, "No."

(p. 245). Later, the plaintiff was asked these series of questions regarding the same conversations on April 17, 1991:

> Q. Did you call back or was this all part of the same conversation?
> A. I had called back the second time.
> Q. Now, what I was asking about before when you asked if there was anything within your restrictions and he said no, that was the second conversation, wasn't it?
> A. Yes.
> Q. Now, are you telling me there was a third conversation?
> A. No.

Q. Then on the second conversation, what else happened on this second conversation? I want everything that happened on this second conversation.
A. Well, I told you.
Q. Have you told me everything that you can now recall?
A. That I can now recall, yes.
Q. He asked you if there was anything, any job, that he had that was within your--you asked him if there was anything down there that you could do that was within your restrictions, and he said, "No?"
A. Yes.
Q. Anything further said on the subject, that you can think of now?
A. No
Q. That's it?
A. Yes.

(pp. 247-284). Not once, but at least three times, the plaintiff testified that Anderson told her on April 17, 1991, that there were no jobs for her within her restrictions. The plaintiff tires to explain away this contradiction by narrowly reading her testimony as Anderson's refusal to find work for her. This is not a fair or reasonable reading. During the deposition, the plaintiff made

no attempt to correct the defense counsel when he summarized her testimony and asked the question again. Nor does the deposition show that plaintiff was confused by these questions or that she meant something other than what she said. Having been present and a party to this conversation with Anderson, the plaintiff had access to all relevant information at the time of her deposition. When deposed, the plaintiff was asked for everything she could recall from the conversation, in particular what Anderson had said about the availability of work for her. The plaintiff never answered or even intimated that Anderson had said there were many jobs available within her restriction. The plaintiff offers no plausible explanation for why she is now able to recall this statement by Anderson. The court strikes paragraph ten as a sham attempt to create an issue of fact.

At paragraph twelve, the plaintiff avers:

> Mr. Anderson and I also talked about permanent jobs that I could perform at Hallmark. A Quality Control job that I requested would require a promotion and Mr. Anderson made it clear that I would not be promoted to a job that I could perform physically. He also made it clear that I would not be promoted because of my injuries and absences.

The plaintiff testified in her deposition that she told Anderson there was a job available which she could do but that she did not tell him it was the quality control position. (pp. 233-34). The plaintiff further testified that she did not apply for the posted quality control job opening as she did not believe she was eligible and there were applicants with more seniority. (pp. 232-33). The plaintiff says her affidavit "simply expands on her testimony." This is not a plausible explanation for the direct

contradiction. "[A] genuine issue of material fact cannot be established by a party contradicting how own earlier statements unless there is a plausible explanation for the incongruity." *Bank Leumi Le-Isreal, B.M. v. Lee*, 928 F.2d 232, 237 (7th Cir. 1991). The court strikes from paragraph twelve the plaintiff's averments that she talked with Anderson about a quality control job and then requested it and that he refused to promote her to the quality control position.

In paragraph thirteen, the plaintiff avers in conclusory terms: "In addition to the Quality Control job, I was able to perform the job duties of the Sort and Salvage job and the Receptionist job." In her deposition, the plaintiff identified only the quality control job as something she could do if promoted. (pp. 229-230). The plaintiff identified that she did sort

and salvage work in the summer of 1990 and that her hands still hurt while doing it. (pp. 80-84). The sort and salvage job, as described by the plaintiff, requires repetitive hand and wrist movement. (pp. 80-81). The plaintiff never mentioned a receptionist job in her deposition as something she could do. She offers no plausible explanation for why she now believes this job was available or was something within her restrictions. The court strikes paragraph thirteen.

In paragraph fourteen, the plaintiff avers: "When I received permanent restrictions from Dr. Hoffman on April 5, 1991, I was told that the restrictions would and could be accommodated." The defendant complains that the plaintiff does not disclose who made this statement to her. The defendant assumes it was Dr. Hoffman and argues this is contradicted by

Dr. Hoffman's deposition. The plaintiff simply denies any contradiction with her deposition and remains silent as to who made the statement to her. The court strikes paragraph fourteen as inadmissible hearsay.

RETALIATORY DISCHARGE

In Kansas, an employee can bring an action for retaliatory discharge if the employer discharges the employee in retaliation for filing a workers' compensation claim, *Murphy v. City of Topeka*, 6 Kan. App.2d 488, Syl. ¶ 7, 630 P.2d 186 (1981) or for being absent or not calling in an anticipated absences because of a work-related injury, *Coleman v. Safeway Stores, Inc.*, 255 Kan. 804 Syl. ¶ 3, 752 P.2d 645 (1988). *Ortega v. IBP, inc.*, 255 Kan 513, 516, 874 P.2d 1188 (1994). Even if the employee has yet to file a workers' compensation claim, a suit can still be brought if the employer knows

of the employee's intent to file a claim and retaliates against the employee. *Chrisman v. Philips Industries, Inc.*, 242 Kan. 772, 775, 751 P.2d 140 (1988).

An employer in Kansas, however, is not forced to retain an employee who because of the work-related injury in physically unable to perform any available job for the employer. The Kansas Court of Appeals first recognized this rule in *Rowland v. Val-Agri, Inc.*, 13 Kan. App.2d 149, Syl. ¶ 4, 766 P.2d 819, *rev. denied*, 243 Kan 780 (1988), where it stated:

> When a discharged employee is not capable of performing the duties of his or her job because of a work-related injury and the termination of that employee's workers' compensation claim is not a condition of his or her reemployment, but another position cannot be found which the employee can fill, the employee does not have a tort action for retaliatory discharge against his or her former employer.

In *Rowland*, the employer had a company policy to terminate an employee who took six consecutive months of leave for any reason. The medical restrictions given for the plaintiff's work-related injury kept him from doing his former job, and there were no light-duty jobs available at the employer's plant. After six months of leave, the employer terminated the plaintiff. The Court of Appeals affirmed the summary judgment ruling for the employer:

> If this court allows Rowland to pursue its claim for retaliatory discharge in addition to his workers' compensation remedy, a disabled employee, who has received compensation for a permanent injury and cannot return to employment, will also be able to file an action in tort for retaliatory discharge against his or her former employer if another position cannot be found which

> the employee can fill. This result is not indicated by either *Murphy* or *Coleman* and would insure two recoveries in every case where an injured worker was unable to return to his or her former employment.

13 Kan. App.2d at 153-154. No retaliatory discharge occurs when an employer terminates an employee who was injured at work and who, after a reasonable period, shows he cannot do the available jobs. *See Marinhagen v. Boster, Inc.*, 17 Kan. App.2d 532, 539, 840 P.2d 534 (1982), *rev. denied*, 252 Kan No. 2 (vii) (1993).

Judge Lungstrum recently granted summary judgment for the employer in a retaliatory discharge case relying on the rule from *Rowland*. *Marquardt v. Miles, Inc.*, No. 93-2153-JWL, 1994 U.S. Dist. LEXIS 5767 (D. Kan. Apr. 14, 1994). The plaintiff, Linda Marquardt, had worked in the defendant's production department for

over ten years. Four months after suffering a back injury at work, she was released for work with a permanent restriction against lifting anything over twenty pounds. The employer then terminated the plaintiff because her lifting restrictions precluded her from doing the available jobs in the production department. Judge Lungstrum granted summary judgment after this cogent analysis:

> Defendant has produced evidence that plaintiff's position and all other available positions for which the Plaintiff was qualified required [illegible]

altered in order to confirm to the twenty pound lifting restriction. Defendant further points to the affidavit of Mr. Sprayberry who states that he made a substantial effort to place plaintiff in another position but simply was unable to, as well as to the testimony of plaintiff indicating that she had a good working relationship with Mr. Sprayberry and had no reason to believe he felt any ill-will towards her. In sum, defendant has shown that it had a reasonable belief that plaintiff was unable, in the foreseeable future, to perform her job and that no other position was available for which she was qualified, able or

> capable of performing the duties of his job at the time of discharge because of his physical condition and no other position could be found which the employee could perform).

1994 U.S. Dist. LEXIS 5767 at *19-20.[3]

In a similar case, Judge Van Bebber also granted summary judgment for the employer. *Koopman v. Water District No. 1 of Johnson County*, No. 88-2573-V, 1991 U.S. Dist. LEXIS 4569 (D. Kan. Mar. 26,

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[3]In an unpublished opinion, the Kansas Supreme Court affirmed a jury verdict for the defendant on a retaliatory discharge claim. *Mitchell v. Thorman Wright Motel Corporation*, NO. 65,353, 1991 Kan. LEXIS 32 (Kan. Mar. 1, 1991). The district court had instructed the jury in part that [illegible]

1991). The plaintiff worked for the defendant as a utility man which required moving concrete water meter pits. Due to the plaintiff' excessive absences, his supervisors requested a medical examination of him. The examining physician, Dr. Parson, placed lifting and movement restrictions which prevented the plaintiff from doing his former job. Unable to find any available jobs for the plaintiff within these restrictions, the defendant terminated the plaintiff. Judge Van Bebber, relying on part of the rule from *Rowland*, held that the plaintiff could not recover for retaliatory discharge. On appeal, the Tenth Circuit affirmed this ruling:

> Appellant argues that the facts in *Rowland* are distinguishable since it was uncontroverted that the plaintiff in *Rowland* could not perform his job duties where as appellant

> testified that he was still capable of performing the duties of a Water Utility Man II. However, appellant has presented no evidence to raise a genuine factual issue about Dr. Parson's medical history, diagnosis and recommendations and there is not evidence that the Water District had any information concerning the cause of appellant's physical condition other than that provided by Dr. Parsons.

Koopman v. Water Dist. No. 1 of Johnson County, 972 F.2d 1160, 1163 (10 Cir. 1992).

The burden is with the employee to prove that she was discharged in retaliation for her workers' compensation claim or for her absences due to the work-related injury. *See Ortega*, 255 Kan. at 528. The employee can recover by proving that the discharge was "based on," "because" of, "motivated by"" or "due to"

the employer's intent to retaliate. *Brown v. United Methodist Homes for the Aged*, 249 Kan. 124, 146-148, 815 P.2d 72 (1991). The employee need not prove that retaliation was the employer's sole motive or reason for the termination. *Brown*, 249 Kan, at 147. The employee must prove her claim "by a preponderance of evidence, but the evidence must be clear and convincing in nature."[4] *Ortega*, 255 Kan at 258.

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[4]"Clear and convincing" refers to the quality of proof, not the quantum. *Newell v. Krause*, 239 Kan. 550, 557, 722 P.2d 530 (1986). For the evidence to be clear and convincing,

> the witnesses to a fact must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the details in connection with the transaction must be narrated exactly and in order; the testimony must be clear, direct and weighty; and the witnesses must be lacking in confusion as to the facts at issue.

Modern Air Conditioning, Inc. v. Cinderella Homes, Inc., 226 Kan. 70, 78, 596 P.2d 816 (1979) (citations omitted). The evidence is clear "if it is certain, unambiguous, and plain to the understanding. It is convincing if it is reasonable and persuasive enough to cause

This case, as with most retaliatory discharge cases, turns upon proof of the employer's intent to retaliate. An employer rarely admits to a retaliatory intent; therefore, the employee must look to circumstantial evidence in proving the claim. *Marinhagen*,, 17 Kan. App.2d at 540. Because reasonable persons may differ on the inferences, critical in determining a person's state of mind, summary judgment is more often the inappropriate way of resolving the issue of an employer's retaliatory intent. *See Koopman*, 972 F.2d at 1164, *Marinhagen*, 17 Kan App.2d at 540. Nevertheless, when the employee fails to come forth with sufficient evidence to raise a genuine issue regarding the employer's intent, the district court may properly grant an

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the trier of facts to believe it." *Ortega*, 255 Kan. at 528 (citing *Chandler v. Central Oil Corp.*, 253 Kan. 50, 58, 853 P.2d 649 (1993)).

employer's motion for summary judgment.

The defendant contends there is no causal connection between the plaintiff's termination and her protected activity in pursuing a workers' compensation claim. The defendant also contends the plaintiff is unable to rebut the defendant's legitimate non-retaliatory reason for discharging her. The defendant ground both connection on two uncontroverted facts. First, Hallmark had no production positions available within the permanent restrictions set by the plaintiff's treating physician. Second, the plaintiff was not qualified or eligible for any other positions at Hallmark. The plaintiff essentially concedes that the defendant reasonably believed that her permanent medical restrictions precluded her from returning to former production

positions on April 17, 1991.[5] She, however, opines that the defendant had jobs available which she could perform.

The plaintiff fails to present evidence raising a genuine issue of fact regarding the availability of work for her. The plaintiff first resorts to citing isolated statements from the depositions of her supervisors, William Thornton, and of the Human Resources Director, Bud Anderson, and argues therefrom that jobs were available. The plaintiff's reading of those depositions ignores context. When read in their

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[5]The court does not understand the plaintiff's affidavit to contradict this fact. It is immaterial what the plaintiff now believes was her capacity, for she never told Hallmark anytime after APril 5, 1991, and before her termination, that they should ignore the permanent restrictions and return her to the card packer position. Hallmark had no contrary medical evidence or other appropriate reason to disregard or discount Dr. Hoffman's permanent restrictions issued on April 5, 1991.

entirely, the depositions are fully consistent with the defendant's position on this issue. Thornton testified that there were temporary light-duty jobs which the plaintiff appeared capable of doing but that the jobs required some repetitive movement and probably violated the permanent restrictions as interpreted by the plaintiff. Thornton did not testify that there were regular full-time production positions which the plaintiff could perform under her restrictions. Indeed, Thornton testified there were none. Thornton further testified that the plaintiff showed she was capable of doing her regular production job only on occasion and not full time. As for Anderson, he testified that the plaintiff appeared capable of doing temporary jobs but explained that Hallmark had tried the temporary light-duty work for a lengthy period without the plaintiff improving to

the point of returning full time to her former job. Based on the plaintiff's interpretation of her doctor's restriction against repetitive movement, Anderson also doubted whether there was any temporary light-duty work available for her. Anderson consistently testified that ton April 17, 1991, there were no permanent jobs at the plaintiff's grad level or lower which were within her restrictions.

The plaintiff next opines there were jobs available which she could do.[6] The

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[6]One of the plaintiff's arguments is that the she was denied vocational rehabilitation because the counselor in the workers' compensation proceeding relied on Dr. Hoffman's testimony in a deposition taken May 20, 1991, that the plaintiff retained the capacity to return to her former job. The plaintiff asks the court to afford res judicata effect to this administrative finding. The plaintiff presents no legal or factual basis for the court to make such a ruling. The counselor's finding was not the final resolution of the workers' compensation proceeding. Indeed, the plaintiff apparently received placement services under an approved vocational rehabilitation plan and was denied

plaintiff, however, presented Hallmark with no medical evidence prior to April 17, 1991, disputing the medical opinion and restrictions imposed by Dr. Hoffman. *See Koopman*, 972 F.2d at 1163 (Employer not at fault for relying on doctor's opinion in its decision to terminate when the employee offers no contrary information); *Marquardt v. miles, Inc.*, 1994 U.S. Dist. LEXIS 5767 at *12-13. The evidence is undisputed that the plaintiff's restrictions prevented her from returning to her former full-time production jobs.

The plaintiff next argues there were other jobs available which she could do;

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retraining only because she had transferable skills. The plaintiff does not present the court with a copy of Dr. Hoffman's testimony taken on May 20, 1991. On the other hand, the court does have deposition testimony given by and exhibits prepared by Dr. Hoffman on other dates which disclose her medical opinion that the plaintiff was incapable of doing her former job.

however, the uncontroverted facts demonstrate she was not eligible, qualified, or able to do them. "[U]nder Kansas Law, employees are not vested with an absolute guarantee of continued employment merely because an injury was sustained in the course of employment. *Raymond v. Archer Daniels Midland Co.*, 762 F. Supp. 901, 905 (D. Kan. 1991). The quality control job was two grades higher than the plaintiff's attained level. When this opening was announced, she did not apply on the belief that she lacked seniority and eligibility. For the plaintiff to have received the quality control job, Hallmark would have had to promote the plaintiff and to discriminate against other employees with more seniority who had applied for the opening. There is no evidence to show that she was eligible for the promotion or qualified to receive the position over the applicants.

Moreover, the evidence of record shows she was not able to do the job. Her physical therapist, who had personal knowledge of the quality control position, opined that this position required a person to move hands and wrists repetitively. Hallmark reasonably believed on April 17, 1991, that the plaintiff was not qualified, eligible or able to do the quality control job.

There is no evidence of an available job in sort and salvage or as a receptionist. The plaintiff testified that while working in sort and salvage in the summer of 1990 her hands continued to hurt. The plaintiff described the sort and salvage job in terms of repetitive movement of hands and wrists. Her physical therapist also said sort and salvage required repetitive movement. The record is devoid of any receptionist position being available for the

plaintiff. The plaintiff has not identified any position within her restrictions that was available on April 17, 1991. Therefore, the plaintiff has not shown it was unreasonable for Hallmark to believe that it had no available jobs within the plaintiff's restrictions for which she was eligible and qualified.

There is not enough evidence from which a reasonable jury could find that the lack of available work was a mere pretext for Hallmark to retaliate against her. Hallmark's pattern of cooperation and accommodation throughout the course of the plaintiff's injuries and recuperation overwhelms the argued inferences of retaliatory intent.

When the plaintiff reported her first problems with pain in wrists and hands, she was transferred to work that was less physically demanding on her wrists and hands. The defendant then offered her a

permanent position in packaging, which she accepted, in the hope that this work would not be such a strain on her hands and wrists. In late September, the plaintiff was treated by a physician and received physical therapy. In compliance with the physician's directions, the defendant placed the plaintiff on very restricted light duty. Upon the orders of a new physician, the defendant put the plaintiff under a light duty program from November 20, 1990 through January 9, 1991, where she worked only one hour a day doing temporary light duty tasks, like answering the phone. During this period, the plaintiff was still paid wages for a full day.

When the plaintiff improved and was then released for full duty on January 10, 1991, the defendant put the plaintiff under a work-hardening program where she rotated between different duties rather

than performing the same repetitive movements for the full shift. Her supervisors also asked her if she was having problems with pain. After a couple of weeks of full duty in packaging in January, the plaintiff's pain flared up again, and the defendant provided her with wrist supports and moved her to less demanding work. After receiving new orders from the plaintiff's physician on February 6, 1991, the defendant placed the plaintiff on light duty which required her to answer the phone for only one-half hour a day. On February 22, 1991, her physician and therapist observed improvement. The physician, however, upon the plaintiff's request, allowed the plaintiff to return to four-hour days of regular duty in order that her symptoms would worsen and the therapist could observe the plaintiff's problems.

In April, the plaintiff again went to

her physician complaining of pain and swelling from working regular duty for only four hours a day. The plaintiff's physician then recommended that the plaintiff change jobs and released her with permanent restrictions against repetitive use of hands and wrists. On April 8, 1991, she returned to work and her managers attempted to accommodate her with varied light tasks that they reasonably thought were consistent with these restrictions. Over the next seven work days, the plaintiff worked only three and a half days taking the rest of the time off because of pain. After these efforts to accommodate her with new jobs and temporary light-duty work, the defendant decided that they lacked available work within the plaintiff's restrictions. On the date of termination, the defendant told the plaintiff that her workers' compensation claim would continue

to conclusion. Approximately twenty months later, the plaintiff's workers' compensation claim was settled with the defendant.

These facts demonstrate that the defendant reasonably provided the plaintiff with less-demanding work when she complained of pain, reasonably complied with the physician's orders and restrictions, reasonably accommodated the plaintiff with temporary light-duty tasks, and reasonably cooperated with the plaintiff and her physicians in working towards the plaintiff's return to full-time regular duty. Prior to the plaintiff's termination, the defendant reasonably attempted to find jobs, temporary and permanent, within the plaintiff's physical restrictions. Based on the plaintiff's continuing problems with pain and swelling and the physician's permanent restrictions after nearly five

months of treatment, the defendant reasonably believed that the plaintiff was unable, in the foreseeable future, to perform her job and that no other position was available for which she was qualified, able, and eligible to perform.

The plaintiff's case depends upon first ignoring all of the defendant's efforts at cooperating with and accommodating the plaintiff and then confusing a retaliatory motive with other legitimate concerns and motives. There is nothing improper about an employer wanting to control or limit its costs by insisting an employee first try appropriate conservative treatment through the company nurse. The court finds nothing wrong with an employer calling an employee's physician and explaining that it has a light-duty program available as an alternative to medical leave. Nor is it unlawful for the employer to monitor more

closely an employee's performance, complaints, and attendance once that employee complains of a work-related injury. Kansas case law does not require the employer to take a "hands off" approach with any employee who suffers a work-related injury. The employer has legitimate interests in seeing that the employee performs the required work, in determining if the injuries interfere with the employee's ability to do the work, and in minimizing the risk that an employee's injuries will be exacerbated by certain work. Finally, an employee injured on the job is not immune from the employer's discipline for problems unrelated to her injury.[7] The court has reviewed in detail

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[7]The record shows that the plaintiff was counseled for absences before reporting an injury. After filing her workers' compensation claim, the plaintiff did have her pay raise suspended because of attendance problems. The defendant, however, provided the raise in December of 1990 even though the plaintiff had been

the facts submitted behind these different actions by the defendant and is unable to draw any reasonable inferences of a retaliatory motive being involved. The court concludes that the plaintiff's evidence and argued inferences fail to create a genuine issue of fact regarding the defendant's motive in terminating the plaintiff. The causal gap between her discharge and her pursuit of workers' compensation remedies is bridged only by the plaintiff's allegation of a retaliatory motive. This is insufficient to avoid summary judgment under the substantive law and evidentiary burdens governing a retaliatory discharge claim. *See Madrigal v. IBP, Inc.*, 811 F. Supp,

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working limited hours and doing temporary jobs and for the last several weeks had been working at most an hour a day under the light-duty program. The court does not infer a retaliatory motive from these circumstances.

612, 615 (D. Kan. 1993), *aff'd*, 21 F. 3d 1121 (10th Cir. 1994) (Table). The defendant is entitled to summary judgment on this claim.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The defendant contends it is entitled also to summary judgment on this claim. Kansas recognizes the tort of intentional infliction of emotional distress or outrage. *Moore v. State Bank of Burden*, 240 Kan. 382, 388, 729 P.2d 1205 (1986), *cert. denied*, 482 U.S. 906 (1987). Liability under this tort arises when a person engages in extreme and outrageous conduct and thereby intentionally or recklessly causes severe emotional distress to the plaintiff. *Id.* To prevail on this claim, the plaintiff must prove:

> (1) The conduct of the defendant must be intentional; (2) the conduct must be extreme and

> outrageous; (3) there must be a causal connection between the defendant's conduct and the plaintiff's mental distress; and (4) the plaintiff's mental distress must be extreme and severe.

Id. (citing *Hoard v. Shawnee Mission Medical Center*, 233 Kan. 267, Syl. ¶ 3, 662 P.2d 1214 (1983). Conduct is not extreme and outrageous unless regarded as exceeding the bounds of decency or as utterly intolerable in a civilized society. *Wiehe v. Kubal*, 225 Kan. 478, 482, 592 P.2d 860 (1979). Liability also depends on clearing two threshold determinations by the court that "the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery; and...[that] the emotional distress suffered by plaintiff is in such extreme degree the law must intervene because the distress inflicted is so severe that no reasonable person

should be expected to endure it." *Roberts v. Saylor*, 230 Kan. 289, 292-93, 637 P.2d 1175 (1981).

The plaintiff fails to allege conduct by the defendant that even approaches the level of extreme and outrageous. Much of what the plaintiff calls extreme is nothing more than the kind of "ordinary business decisions...made every day by employers across the nation." *Anspach v. Tomkins Industries, Inc.*, 817 F. Supp. 1499, 1508 (D. Kan. 1993). These decisions include the defendant's refusal to refer the plaintiff to a physician before ruling out conservative treatment and alternative jobs, the defendant's warning that the plaintiff must cooperate with physical therapy, and the defendant's efforts at finding temporary light-duty work for her to do. These actions plainly are not extreme or outrageous in character and do not become so simply because the

plaintiff believes they were driven by a retaliatory motive. *See Anspach*, 817 F. Supp. at 1508; *Fletcher v. Wesley Medical Center*, 585 F. Supp. 1260, 1262 (D. Kan. 1984). There are no aggravating circumstances to any of these actions that amount to extreme and outrageous.

Nor has the plaintiff shown that she suffered severe or extreme emotional distress or something more than the ordinary anger and disappointment felt by employees who think they have been unjustly transferred or terminated. *See Polson v. Davis*, 635 F. Supp. 1130, 1151 (D. Kan. 1986); *Fletcher*, 585 F. Supp. at 1262. The psychological evaluation submitted by the plaintiff does not evidence that the plaintiff ever suffered anything more than ordinary anger with losing her job and financial support. The plaintiff's psychologist never opines that the plaintiff experiences something close

to severe or extreme emotional distress as a result of the defendant's actions. The defendant is entitled to summary judgment on this claim of intentional infliction or emotional distress.

IT IS THEREFORE ORDERED that the plaintiff's motion for summary judgment (Dk. 62) is denied;

IT IS FURTHER ORDERED that the defendant's motion for summary judgment (Dk. 64) is granted;

IT IS FURTHER ORDERED that the defendant's motion to strike (Dk. 77) is granted in part.

Dated this 14th day of September, 1994, Topeka, Kansas

Sam A. Crow, U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALICIA BARBER,
Plaintiff- Appellant

v. No. 94-3356

HALLMARK CARDS, INC.,
Defendant- Appellee.

ORDER
Entered February 21, 1996

Before BRISCOE and MURPHY, Circuit Judges, and JENKINS,* Senior District Judge.

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*The Honorable Bruce S. Jenkins, Senior United States District Judge for the District of Utah, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
Patrick Fisher, Clerk
(Signed by L. Balzano
Deputy Clerk.)